

**Notice of Proposed Regulatory Action**  
**The State Board of Equalization Proposes to Adopt**  
**California Code of Regulations, Title 18, Sections**  
**2000, *Retailer Reimbursement Retention*, and**  
**2001, *Additional Allowed Retailer Reimbursement Retention***

NOTICE IS HEREBY GIVEN

Public Resources Code (PRC) section 4629.5, subdivision (a)(1) imposes a one-percent assessment on purchasers of lumber products and engineered wood products (Lumber Products Assessment) on and after January 1, 2013. PRC section 4629.5, subdivision (a)(3) requires retailers to collect the assessment and provides that retailers “may retain an amount [from the assessments they collect] equal to the amount of reimbursement, as determined by the State Board of Equalization [(Board)] pursuant to regulations, for any costs associated with the collection of the assessment” imposed by subdivision (a)(1). The Board, pursuant to the authority vested in it by PRC section 4629.5, subdivision (a)(3) has adopted California Code of Regulations, title 18, section (Regulation) 2000, *Retailer Reimbursement Retention*, as an emergency regulation pursuant to Government Code section 11346.1, to specify the amount of reimbursement a retailer may retain pursuant to PRC section 4629.5, subdivision (a)(3). The Board now proposes to adopt emergency Regulation 2000, through the regular rulemaking process, to comply with Government Code section 11346.1, and proposes to adopt new Regulation 2001, *Additional Allowed Retailer Reimbursement*, to specify an additional amount of reimbursement that a retailer may retain pursuant to PRC section 4629.5, subdivision (a)(3), beginning January 1, 2014.

PUBLIC HEARING

The Board will conduct a meeting in the Auditorium Room, at the California Public Utilities Commission’s headquarters, located at 505 Van Ness Avenue, San Francisco, California, on September 10, 2013. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board’s Website at [www.boe.ca.gov](http://www.boe.ca.gov) at least 10 days in advance of the meeting.

A public hearing regarding the proposed regulatory action will be held at 10:00 a.m. or as soon thereafter as the matter may be heard on September 10, 2013. At the hearing, any interested person may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed Regulations 2000 and 2001.

AUTHORITY AND REFERENCE

PRC section 4629.5

## INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

### Current Law

#### *PRC section 4629.5*

PRC section 4629.5, as enacted by Assembly Bill No. (AB) 1492 (Stats. 2012, ch. 289), imposes, on and after January 1, 2013, a one-percent Lumber Products Assessment on purchasers of lumber products and engineered wood products to be collected by retailers at the time of sale. As enacted by AB 1492, PRC section 4629.5, subdivision (a)(3) authorizes the Board to adopt regulations to determine the amount retailers may retain from the assessments they collect as reimbursement for certain compliance costs. Specifically, PRC section 4629.5, subdivision (a)(3), in relevant part, provides:

The retailer shall collect the assessment from the person [i.e., purchaser] at the time of sale, and may retain an amount equal to the amount of reimbursement, as determined by the State Board of Equalization pursuant to regulations, for any costs associated with the collection of the assessment, to be taken on the first return or next consecutive returns until the entire reimbursement amount is retained.

Notably, PRC section 4629.5 and the legislative analyses of AB 1492 do not expressly indicate how the Board is to determine the amount of reimbursement that retailers may retain. However, the statute does appear to provide that retailers may only retain the Board-prescribed amount of reimbursement one time, on the retailers' first returns or next consecutive returns filed immediately after the retailers are required to begin collecting the Lumber Products Assessment on January 1, 2013. And, the statute does not authorize retailers to retain additional amounts thereafter.

As to legislative history, both the relevant Senate and Assembly floor analyses refer to retailers being reimbursed for "costs to set up collection systems." (See p. 2 of the September 1, 2012, Assembly Floor Analysis of AB 1492 and p. 2 of the August 29, 2012, Senate Floor Analysis of AB 1492.) Thus, both the plain language of PRC section 4629.5, subdivision (a)(3) and the available information regarding legislative intent support an interpretation that subdivision (a)(3) provides for affected retailers to retain a one-time amount, as specifically determined by the Board, for reimbursement of costs to set up collection systems prior to the commencement of their collection duties on January 1, 2013. Neither the plain language of PRC section 4629.5, subdivision (a)(3) nor the available legislative history persuasively support an interpretation that would allow for the retention of amounts in excess of the Board-specified reimbursement amount to compensate retailers for ongoing collection costs.

#### *Emergency Regulation 2000*

In addition, PRC section 4629.5, subdivision (a)(3), as added by AB 1492, authorizes the Board to “adopt emergency regulations,” pursuant to Government Code section 11346.1, to prescribe the amount retailers may retain from the Lumber Products Assessments they collect, and provides that the adoption of any such regulations “shall be deemed to be an emergency and necessary for the immediate preservation of the public peace, health, and safety, and general welfare.” Therefore, on October 23, 2012, the Board voted to:

- Added new chapter 4.1 to division 2 of title 18 of the California Code of Regulations so that any regulations the Board is required to adopt to implement, interpret, and make specific the Lumber Products Assessment imposed by PRC section 4629.5 can be codified in the new chapter; and
- Adopt Regulation 2000, which is codified in new chapter 4.1, as an emergency regulation, in order to determine the “amount of reimbursement” a retailer may retain pursuant to PRC section 4629.5, subdivision (a)(3), before retailers started collecting the new assessment on January 1, 2013.

Emergency Regulation 2000 provides that retailers as of January 1, 2013, may retain collected assessment amounts of up to \$250 per location as reimbursement for one-time, startup costs associated with the collection of the assessment (i.e., the costs to set up collection systems). Specifically, Regulation 2000 provides:

Public Resources Code section 4629.5, as added by Statutes 2012, chapter 289, requires the Board of Equalization to adopt a regulation to determine the amount of reimbursement a retailer may retain for costs associated with the collection of the Lumber Products Assessment imposed by Public Resources Code section 4629.5.

A retailer required to collect the Lumber Products Assessment may retain no more than \$250 per location as reimbursement for startup costs associated with the collection of the assessment. Such reimbursement is to be taken on the retailer’s first return on which the Lumber Products Assessment is reported or, if the amount of the collected assessment is less than the allowed reimbursement, on the retailer’s next consecutive returns until the allowed reimbursement amount is retained.

“Location” means and is limited to a business location registered under the retailer’s seller’s permit as of January 1, 2013, where sales of products subject to the assessment are made.

The \$250 retention amount in emergency Regulation 2000 is based on the Board’s understanding of the amount of retailer reimbursement discussed when AB 1492 was drafted. Staff also estimated the \$250 retention amount in emergency Regulation 2000 using U.S. Census Bureau data and a 2006 PricewaterhouseCoopers report on gross retail sales tax compliance costs for programming and servicing cash registers for sales tax rate and bases changes (PricewaterhouseCoopers report). And, emergency Regulation 2000

recognizes that an affected retailer's start-up costs will be affected by the number of retail locations the retailer must get ready to collect the new assessment on January 1, 2013.

An emergency regulation adopted pursuant to Government Code section 11346.1 is effective for a 180-day period. The Office of Administrative Law (OAL) may approve two readoptions of the same emergency regulation, under specified circumstances, each for an effective period of 90 days. However, an emergency regulation will automatically be repealed and deleted from the California Code of Regulations, unless the regulation is readopted through the regular rulemaking process before the emergency regulation ceases to be effective. (Gov. Code, § 11346.1, subs. (e), (g), and (h).)

Emergency Regulation 2000 became effective on January 1, 2013. The Board subsequently readopted emergency Regulation 2000 in accordance with Government Code section 11346.1, subdivision (h). OAL approved the readoption on June 25, 2013, and indicated that readopted emergency Regulation 2000 will not expire until September 24, 2013. Therefore, OAL still has discretion to approve one more readoption of emergency Regulation 2000 before that time, which may extend the effective period of the regulation by an additional 90 days.

#### Effect, Objectives, and Benefits of the Proposed Adoption of Regulations 2000 and 2001

##### *Business Taxes Committee Process*

The California Forestry Association supported the initial adoption of emergency Regulation 2000 and the \$250 reimbursement amount established by the regulation. However, the Board did not immediately propose to adopt emergency Regulation 2000 through the regular rulemaking process because other interested parties, including the California Retailers' Association and the West Coast Lumber & Building Material Association (West Cost), argued that affected retailers should receive more reimbursement, including reimbursement on an ongoing basis. Therefore, on October 23, 2012, the Board also unanimously voted to begin a Business Taxes Committee (BTC) process to meet with interested parties and discuss the adoption of a regulation, through the regular rulemaking process, to permanently specify the amount of reimbursement a retailer may retain for costs associated with the collection of the Lumber Products Assessment imposed by PRC section 4629.5 beginning January 1, 2013.

##### *Start-up Costs and Ongoing Costs*

During the BTC process, some interested parties read PRC section 4629.5, subdivision (a)(3), as providing for reimbursement of "any costs" associated with the collection of the Lumber Products Assessment, including ongoing costs. However, as previously discussed, Board staff believes that PRC section 4629.5, subdivision (a)(3) authorizes the Board to determine and prescribe a specific one-time amount of reimbursement for start-up costs to implement the Lumber Products Assessment on January 1, 2013, that may be retained by all affected retailers, regardless of their actual costs; and staff does not believe that the statute allows retailers to retain a percentage of the assessments they

collect or retain unique amounts of reimbursement for their actual start-up or ongoing costs. This is primarily because:

- PRC section 4629.5 expressly provides that retailers may only retain “an amount” determined by the Board and does not authorize retailers to calculate and retain other amounts;
- PRC section 4629.5 requires a retailer to retain the Board prescribed amount of reimbursement from the assessments reported on its “first return or next consecutive returns until the entire reimbursement amount is retained”; and
- PRC section 4629.5 does not expressly provide for the ongoing retention of a percentage of collected assessments, as do the California Tire Fee Law and Covered Electronic Waste Recycling Fee Law, which both expressly authorize retail sellers to retain 1.5 percent (PRC § 42885) and 3 percent (PRC § 42464), respectively, of the fees they collect as ongoing reimbursement of collection costs.

Staff’s understanding of PRC section 4629.5, subdivision (a)(3), is consistent with the Senate and Assembly floor analyses of AB 1492, which refer to retailers being reimbursed for “...costs to set up collection systems,” not ongoing costs of collection. The interested parties that supported AB 1492, including the California Forestry Association, California Native Plant Society, Forests Forever, Pacific Forest Trust, Sierra Club, and the Center for Biological Diversity, have confirmed that staff’s understanding of PRC section 4629.5, subdivision (a)(3) is consistent with the intent of AB 1492. In addition, California Assemblymembers Bob Blumenfield, Wesley Chesbro, Richard Gordon, Richard Bloom, and Roger Dickinson have recommended to the Board that reimbursement be limited to startup costs.

#### *Amount of Reimbursement for Start-up Costs*

In addition, Board staff and some interested parties continued to disagree about the “amount” that affected retailers should be permitted to retain as reimbursement for start-up costs during the BTC process. These interested parties believe that the reimbursement amount in emergency Regulation 2000 is too low and that the amount should be increased to compensate most retailers for their actual start-up costs. For example, Caseywood estimated that it cost \$7,000 to implement computer system, internal process, and accounting changes necessary to comply with the new law. Other retailers advised staff that their current accounting systems could not be updated to calculate the new assessment, and that they were forced to update both software and hardware, at an estimated cost of \$45,000, in order to implement the assessment. Also, West Coast surveyed its members and informed staff that the members’ average cost to implement the assessment was \$5,480 per location.

To get a better idea of retailers’ average costs to update their software for the Lumber Products Assessment, staff contacted three software companies that provide software packages for the retail lumber industry. One company indicated that it included the update to collect the assessment in its annual software update and did not charge an

additional amount to its existing customers, and the other software providers advised staff that for current customers they generally charged \$250 per location to update their software to collect the assessment. The software providers also explained that their charges (if any) did not include the hours spent reviewing inventory and coding SKU's (stock keeping units) for products subject to the assessment. These tasks were typically completed by a retailer's employees with the expense incurred directly by the retailer. Further, staff learned that retailers who use custom or proprietary accounting software were not able to take advantage of pricing discounts from package software providers and generally paid hourly rates for software technicians to update their systems. Furthermore, staff found that one company estimated that for a new retail account, they would charge about \$30,000 plus a monthly fee to set up a whole new accounting system that performed various functions, including collecting the Lumber Products Assessment.

To get a better idea of retailers' average costs to update their software for the assessment, staff also continued to review the available cost data, including the PricewaterhouseCoopers Report, referred to above, and found another reasonable alternative method that could be used to estimate affected retailers' average start-up costs. First, staff found that the purpose of AB 1492 was, among other things, to ensure continued sustainable funding for California's forest program to protect the state's forest resources and to replace the current piecemeal funding structure with a single funding source and that the amount of allowed retention directly affects the revenue the fund receives. Second, in Board staff's September 11, 2012, Legislative Enrolled Bill Analysis of AB 1492, staff estimated that the new one-percent Lumber Products Assessment would generate annual revenue of \$35 million from approximately \$3.5 billion of sales subject to the assessment. Third, during the BTC process, staff estimated, using U.S. Census Bureau data, that there were close to 10,000 retail locations that were required to begin collecting the new assessment on January 1, 2013, and that each location would collect an annual average of \$3,500 in assessments on average annual sales of \$350,000 subject to the assessment.

Fourth, staff also analyzed the PricewaterhouseCoopers Report in more detail, and found that the \$250 amount in emergency Regulation 2000 accounted for costs to program and service cash registers (and other point-of-sale systems), but did not account for all of the categories of compliance costs, included in the study. Further, staff found that the PricewaterhouseCoopers Report shows an average gross compliance cost of 0.21 percent of taxable sales for the Building and Garden Supplies industry. Furthermore, staff recognized that the percentage was derived from looking at some costs that were not properly classified as start-up costs, such as costs to deal with audits and appeals, but that the percentage also failed to account for some costs that were properly classified as start-up costs, such as costs to identify and code products subject to the assessment. Therefore, staff concluded that it would be reasonable to use the percentage to calculate start-up costs.

As a result, during the BTC process, Board staff calculated that the average amount of start-up costs to implement the Lumber Products Assessment on January 1, 2013, was approximately \$735 per retail location by multiplying the average amount of annual sales

subject to the assessment that staff estimated would be made by each retail location (\$350,000) by 0.21 percent. Staff proposed that affected retailers be permitted to retain an additional \$485 (\$735 - \$250) from the assessments they collect, for start-up costs, beginning January 1, 2014. Therefore, staff recommended that the Board propose to adopt emergency Regulation 2000, through the regular rulemaking process, without making any changes, and that the Board also propose to adopt new Regulation 2001, through the regular rulemaking process, to provide that “[b]eginning January 1, 2014, a retailer required to collect the Lumber Products Assessment may retain \$485 per location, in addition to the \$250 allowed by Regulation 2000, as [additional] reimbursement for startup costs associated with the collection of the assessment.”

During its BTC meeting on June 11, 2013, the Board tentatively agreed with staff’s revised calculation of the average amount of start-up costs to implement the Lumber Products Assessment on January 1, 2013, of approximately \$735 per retail location. Therefore, the Board voted to propose to adopt emergency Regulation 2000, through the regular rulemaking process, without making any changes, and also to propose to adopt new Regulation 2001, through the regular rulemaking process. The Board’s objective for proposing to adopt emergency Regulation 2000 and Regulation 2001 is to have the effect of prescribing \$735 per retail location as the total amount of reimbursement that affected retailers may retain from the Lumber Products Assessments they collect as reimbursement for start-up costs pursuant to PRC section 4629.5. The regulations are anticipated to provide the following benefits:

- Provide certainty as to the amount of reimbursement retailers may retain pursuant to PRC section 4629.5;
- Permit retailers to retain the amount of reimbursement determined by the Board without requiring retailers to keep additional records or substantiate their individual costs; and
- Preserve the public peace, health, safety, and general welfare, as provided in PRC section 4629.5, subdivision (a)(3).

The Board has performed an evaluation of whether proposed Regulations 2000 and 2001 are inconsistent or incompatible with existing state regulations and determined that the regulations are not inconsistent or incompatible with existing state regulations because they are the only state regulations prescribing the “amount of reimbursement” a retailer may retain pursuant to PRC section 4629.5, subdivision (a)(3). In addition, there is no federal assessment similar to the Lumber Products Assessment imposed by PRC section 4629.5 and there are no comparable federal regulations or statutes to proposed Regulations 2000 and 2001.

## NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of proposed Regulations 2000 and 2001 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

## **NO COST OR SAVINGS TO STATE AGENCIES, LOCAL AGENCIES, AND SCHOOL DISTRICTS**

The Board has determined that the adoption of proposed Regulations 2000 and 2001 will result in no direct or indirect cost or savings to any state agency, any cost to local agencies or school districts that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, other non-discretionary cost or savings imposed on local agencies, or cost or savings in federal funding to the State of California.

## **NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS**

The Board has made an initial determination that the adoption of proposed Regulations 2000 and 2001 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of proposed Regulations 2000 and 2001 may affect small business.

## **NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES**

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

## **RESULTS OF THE ECONOMIC IMPACT ANALYSIS REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)**

The Board has prepared the economic impact analysis required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. The Board has determined that the adoption of proposed Regulations 2000 and 2001 will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California. Furthermore, the Board has determined that the adoption of proposed Regulations 2000 and 2001 will not affect the health and welfare of California residents, worker safety, or the state's environment.

## **NO SIGNIFICANT EFFECT ON HOUSING COSTS**

The adoption of proposed Regulations 2000 and 2001 will not have a significant effect on housing costs.

## **DETERMINATION REGARDING ALTERNATIVES**



The Board must determine that no reasonable alternative considered by it or that has been otherwise identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action.

## CONTACT PERSONS

Questions regarding the substance of the proposed regulations should be directed to Bradley M. Heller, Tax Counsel IV, by telephone at (916) 323-3091, by e-mail at [Bradley.Heller@boe.ca.gov](mailto:Bradley.Heller@boe.ca.gov), or by mail at State Board of Equalization, Attn: Bradley M. Heller, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

Written comments for the Board's consideration, notice of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed administrative action should be directed to Mr. Rick Bennion, Regulations Coordinator, by telephone at (916) 445-2130, by fax at (916) 324-3984, by e-mail at [Richard.Bennion@boe.ca.gov](mailto:Richard.Bennion@boe.ca.gov), or by mail at State Board of Equalization, Attn: Rick Bennion, MIC:80, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0080.

## WRITTEN COMMENT PERIOD

The written comment period ends at 10:00 a.m. on September 10, 2013, or as soon thereafter as the Board begins the public hearing regarding the adoption of proposed Regulations 2000 and 2001 during the September 10, 2013, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt proposed Regulations 2000 and 2001. The Board will only consider written comments received by that time.

## AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION

The Board has prepared underscored versions of the text of Regulations 2000 and 2001 illustrating the express terms of the proposed regulations and an initial statement of reasons for the adoption of the proposed regulations, which includes the economic impact analysis required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed regulations are based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed regulations and the initial statement of reasons are also available on the Board's Website at [www.boe.ca.gov](http://www.boe.ca.gov).

## SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Board may adopt proposed Regulations 2000 and 2001 with changes that are nonsubstantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. Additional information could change staff's calculation of \$735 as the average start-up costs per retail location to implement the Lumber Products Assessment, help staff identify other, more reliable methods to calculate the average start-up costs per retail location, or both, as discussed in detail in the initial statement of reasons. Therefore, at the conclusion of the June 11, 2013, BTC meeting, the Board directed staff to continue to monitor the implementation of the Lumber Products Assessment and review the returns filed for the first and second quarters of 2013 to try to obtain additional information to help verify the number of retail locations that were required to begin collecting the new assessment on January 1, 2013, and the amount of revenue they are actually collecting. And, the Board indicated that, depending upon the additional information obtained, including information regarding the effectiveness of AB 1492 as a source of funding, and staff's recommendation at the public hearing, the Board may decide to adopt proposed Regulation 2000 without making any changes and not adopt proposed Regulation 2001, the Board may decide to adopt both proposed regulations without making any changes, or the Board may decide to adopt both regulations and change the total amount of reimbursement provided to affected retailers.

If a sufficiently related change is made to either proposed regulation, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

## AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts proposed Regulations 2000 and 2001, the Board will prepare a final statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at [www.boe.ca.gov](http://www.boe.ca.gov).